



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: F&E Erection Company

File: B-234927

Date: June 19, 1989

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### DIGEST

A bid in which the bidder submitted inflated prices for two line items should have been rejected as materially unbalanced where the bidder will receive payment for those line items early in the contract performance, tantamount to an advance payment or interest-free loan to which the bidder is not entitled based on the actual value of the work to be performed under the two line items.

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### DECISION

F&E Erection Company, a Division of CCC Group, Inc., protests the anticipated award of a contract to CAT Contracting, Inc./Michigan Sewer Construction Company under invitation for bids (IFB) No. DACW 64-89-B-0027, issued by the Army Corps of Engineers for construction of the Suntide Effluent Ditch Project at Corpus Christi Ship Channel, Texas. F&E argues that CAT's low bid must be rejected because it is materially unbalanced<sup>1/</sup>. F&E also requests reimbursement of the costs it incurred in submitting its bid and in pursuing this protest.

We sustain the protest.

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<sup>1/</sup> In its initial protest submission F&E also alleged that CAT's bid should be rejected as nonresponsive because CAT did not acknowledge amendment No. 2 to the solicitation. The Corps responded that it properly waived CAT's failure to acknowledge the amendment because the amendment was not material in that it did not have more than a trivial impact on price, quality, quantity or delivery or the relative standing of the bidders. See Federal Acquisition Regulation § 14.405(d)(2); Star Brite Construction Co., Inc., B-228522, Jan. 11, 1988, 88-1 CPD ¶ 17. In its comments on the Corps' report F&E did not dispute the Corps' response. We therefore consider this issue abandoned. See XMCO, Inc., B-228357, Jan. 26, 1988, 88-1 CPD ¶ 75.

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The IFB required bidders to submit prices for six line items of work concerning construction of the ditch project. The work was to be completed within 200 days from the date the contractor received a notice to proceed. The RFP provided that the government would make monthly progress payments to the successful contractor based on the work accomplished. The contract was to be awarded to the responsive, responsible bidder that submitted the low aggregate bid.

The Corps received nine bids in response to the solicitation with CAT submitting the low bid of \$797,000 and F&E the second low bid of \$884,675. The breakdown of the bids of CAT, F&E and the government estimate is as follows:

	<u>CAT</u>	<u>F&amp;E</u>	<u>Government</u>
1. Clearing & Removal of Debris	\$75,000	\$4,399	\$13,741
2. Stripping	150,000	4,759	11,774
3. Effluent Ditch Excavation	254,400	169,494	58,046
4. Culverts/Headwalls	244,800	628,607	641,816
5. Blanket Stone	27,000	16,837	10,314
6. Riprap	44,000	18,779	17,072
7. As-Built Drawings	1,800	1,800	1,800
Total	\$797,000	\$844,675	\$854,563

F&E protests that CAT's bid must be rejected as materially unbalanced because it is so front loaded for line items 1 and 2 that an award to CAT will result in what will be tantamount to a prohibited advance payment.<sup>2/</sup> See 31 U.S.C. § 3324(a) (Supp. IV 1986). In this regard, F&E estimates that it will take approximately 2 weeks for a contractor to complete the work required by line items 1 and 2. Thus, F&E reasons that in the first monthly progress payment CAT will receive 28 percent of the total contract price for performing what the government estimates as 2.9 percent of the

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<sup>2/</sup> An advance payment occurs when a payment under a contract to provide services or deliver an article is more than the value of the services already provided or the article already delivered. Edgewater Machine & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630.

required work. F&E also notes that CAT's bid for line items 1 and 2 exceeds the government estimate by 881 percent and its own bid by 2,546 percent and argues that CAT's bid for line items 1 and 2 bears no reasonable relationship to the value of the work performed under those line items.

In its response, the Corps admits that CAT's bid is based on inflated prices for items 1, 2, 3, 5, and 6 and a substantially low price for item 4. The Corps argues, however, that it was not required to reject CAT's bid because there was no reasonable doubt that award to CAT would result in the lowest cost to the government and, therefore, the bid was not materially unbalanced. The Corps further argues that CAT will not receive the equivalent of an advance payment because under the progress payments clause contained in the IFB CAT will only receive payments based on the amount of work performed and its cost. The Corps also claims that pursuant to the progress payments clause it can request CAT to submit a breakdown of the contract price to provide a basis for determining progress payments based on the value of the work performed.

A bid which is materially unbalanced must be rejected as nonresponsive. Howell Construction, Inc., 66 Comp. Gen. 413 (1987), 87-1 CPD ¶ 455. A bid is materially unbalanced if the bid is based on nominal prices for some items and enhanced prices for other items and there is a reasonable doubt that an award based on the bid will result in the lowest cost to the government. Atlas Disposal System, Inc., B-229714, Feb. 23, 1988, 88-1 CPD ¶ 186. Here, there is nothing in the record to suggest that an award to CAT will not result in the lowest cost to the government.

We have recognized, however, that in certain circumstances a bid which is grossly unbalanced should be rejected, even if low, since payments made under a contract awarded pursuant to such a bid would amount to improper advance payments prohibited by 31 U.S.C. § 3324. See Canaveral Maritime, Inc., B-231857.4; B-231857.5, May 22, 1989, 89-1 CPD ¶ \_\_\_\_; Riverport Industries, Inc., 64 Comp. Gen. 441 (1985), 85-1 CPD ¶ 364, aff'd, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108. Many of our prior decisions in this area involved procurements calling for first article and production units where a bidder's price for its first article units was substantially in excess of their value, in effect including costs for the first article units that should have been included in the price submitted for the production units. In these circumstances, we held that the bid must be rejected even though it would result in the lowest cost to the government because the acceptance of such a bid both would result in a prohibited advance payment, see Riverport Industries, Inc.,

64 Comp. Gen. 441, supra, and would be detrimental to the competitive bidding system. Specifically, it would allow the bidder to enjoy an advantage not enjoyed by its competitors for the award--the use of interest-free money for contract start-up purposes. Nebraska Aluminum Castings, Inc.--Second Request for Reconsideration, B-222476.3, Nov. 4, 1986, 86-2 CPD ¶ 515. It also would provide a disincentive for the government to administer the contract in a manner consistent with its best interests if contingencies should arise after the first article has been paid for and accepted that would ordinarily require termination. Id.; Edgewater Machine & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630.

The present case involves a construction contract rather than a production contract under which first article units must be delivered. Nevertheless, where, as here, the bidder will receive progress payments as performance proceeds, the problems inherent in permitting a bidder to submit inflated prices for bid items for which it will receive payment early in the performance of the contract are the same. That is, the bidder will receive a competitive advantage because it will receive payment which exceeds the value of work performed and the government will have a disincentive to properly administer the contract.

Accordingly, we agree with F&E that the bid of CAT is based on such substantially inflated prices for line items 1 and 2 that it must be rejected as materially unbalanced. In this regard, CAT bid \$75,000 for line item 1 and \$150,000 for line item 2. In contrast, the government estimate for line item 1 is \$13,741, and the eight other bidders submitted prices ranging from \$2,100 to \$14,785. For line item 2 the eight other bidders submitted bids ranging from \$1,000 to \$28,886.69, and the government estimate is \$11,744.00. The record does not contain any explanation for these differences in the bid prices. In fact, as discussed above, the Corps agrees that CAT's prices for line items 1 and 2 do not reflect the value of the work contemplated by these items. Thus, since the solicitation provides for progress payments and CAT will receive payments for items 1 & 2 in excess of the value of the work performed, we find that CAT's bid must be rejected.

In reaching this conclusion we note that the Corps argues that CAT will not receive payments in excess of the value of the work performed because the progress payments will correspond to work completed and because the Corps can request a breakdown of the contract price to determine the progress payments based on the value of the work performed. These arguments might have merit in a situation where the

contractor submits its bid on a lump sum basis and the contracting officer later is required to determine the value of the work completed to compute the amount of progress payment due the contractor. Where, as here, however, the contractor is required to submit individual prices for separate line items and this breakdown is incorporated into the contract, in our view, the contractor will receive progress payments based on the amount it bid for the particular line item.<sup>3/</sup> As a result, since CAT's bid prices for line items 1 and 2 are far in excess of the value of the work performed under those line items, the progress payments based on those bid prices likewise will not accurately reflect the value of the work performed and thus will present the same evils as prohibited advance payments.

In view of our conclusion that CAT's bid was materially unbalanced, we sustain the protest and recommend that the Corps reject CAT's bid and award the contract to the next low, responsive, responsible bidder, which appears to be F&E. Since F&E will be considered for award, it is not entitled to reimbursement of its bid preparation costs. Programmatic, Inc.; Telesynetics Corp., B-228916.2; B-228916.3, Jan. 14, 1988, 88-1 CPD ¶ 35. F&E, however, is entitled to recover the costs it incurred in filing and pursuing this protest, including attorneys' fees. The firm should submit its claim for these costs directly to the Corps. 4 C.F.R. § 21.6(e) (1988).

The protest is sustained.



Acting Comptroller General  
of the United States

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<sup>3/</sup> Indeed, both the Chief of the Construction-Operations Division and the Chief of the Engineering Division state in documents submitted by the Corps in connection with F&E's protest that since CAT's prices for items 1 and 2 are high, CAT will receive large payments for these items early in the contract.